

RENO-SPARKS INDIAN COLONY
v.
PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-72-A, 93-86-A

Decided September 21, 1993

Appeals from decisions rejecting applications for grants under the Small Tribes Grant and Planning Grant programs.

Vacated; referred to Assistant Secretary - Indian Affairs.

1. Indians: Financial Matters: Financial Assistance--Regulations: Interpretation

Bureau of Indian Affairs regulations and guidelines concerning grant programs for Indian tribes are subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

2. Indians: Financial Matters: Financial Assistance--Regulations: Interpretation

In administering competitive grant programs for Indian tribes, the Bureau of Indian Affairs has a duty to provide fair and equitable treatment to all applicants. This duty includes an obligation to ensure that the Bureau's Area Offices interpret the basic eligibility criteria for the programs in a consistent matter. It also includes an obligation to provide clear notice of the eligibility criteria to potential grant applicants.

APPEARANCES: Arlan D. Melendez, its Chairman, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Reno-Sparks Indian Colony seeks review of a March 18, 1993, decision of the Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning an application for a FY 1993 Small Tribes grant, and a March 31, 1993, decision of the Acting Area Director, concerning an application for a FY 1993 Planning grant. In both cases, appellant's applications were rejected on grounds of ineligibility because they failed to include copies of appellant's current organization-wide single audit report. For the reasons discussed below, the Board vacates the Area Director's decisions and refers these appeals to the Assistant Secretary -Indian Affairs.

Background

Both the Small Tribes Grant Program and the Planning Grant Program were announced in the Federal Register on November 18, 1992, 57 FR 54480 and 54409. Appellant submitted an application under the expansion/enhancement component of the Small Tribes Grant Program. It also submitted an application under the Planning Grant Program.

On March 18, 1993, the Area Director informed appellant that its application for a Small Tribes grant

was rated disqualified among the 13 tribal applications received to be considered for a grant under the terms of the announcement because of the following reason:

The applicant did not meet Federal Register Vol 57, No. 223, dated 11-18-92, Section B(3)(c) wherein applicant must provide a copy of their current organization-wide single audit report. The applicant failed to comply with this mandatory requirement. (Emphasis in original.)

On March 31, 1993, the Acting Area Director informed appellant that its Planning grant application was also rated disqualified. The Acting Area Director's decision stated: "The applicant did not meet C(2)(a)(ii) of the Federal Register dated November 18, 1992, wherein applicant must provide a copy of their current organization wide single audit report. The applicant failed to comply with this mandatory requirement." 1/ (Emphasis in original.)

Appellant's notices of appeal were received by the Board on April 19 and 21, 1993. Appellant included statements of reasons with its notices of appeal.

Discussion and Conclusions

Appellant concedes that it did not submit copies of its audit report with either of its grant applications. It submits copies of the audit with both appeals.

The Board cannot consider this new information. In a competitive grant program, BIA has a duty to give fair and equitable consideration to all grant applicants. Therefore, it can consider only the information and supporting documents included with the original grant application. Because BIA would have been precluded from considering such additional information, the Board is also precluded from doing so. E.g., Chippewa Cree Tribe v. Acting Billings Area Director, 23 IBIA 129 (1992).

1/ The record shows that both of appellant's applications were assigned a rating of zero.

Under other circumstances, the Board might summarily affirm the Area Director's decisions on the grounds that appellant failed to carry its burden of proof. E.g., Sauk-Suiattle Indian Tribe v. Portland Area Director, 20 IBIA 238 (1991). Here, however, although appellant has not raised the issue, the Board finds that the resolution of these appeals requires an analysis of certain internal conflicts in the Federal Register notices for the two grant programs. The Board considers this matter under its authority in 43 CFR 4.318 to "exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

The Federal Register notice for the Small Tribes Grant Program provides, in section B, "Eligibility Criteria":

(3) Expansion/Enhancement Component--

Small Tribes applying for a grant under this component shall meet all of the following criteria:

(a) Only the governing body of a small Indian tribe may apply for, or authorize a multi-tribal organization to apply for, a grant under this announcement;

(b) Only a federally recognized Indian tribe with a population of 1500 or less who resides [sic] on or near the applicant tribe's reservation or community and has a leadership empowered under the tribe's system of government to act on behalf of the tribe may apply for a grant under this announcement.

(c) In addition to the basic eligibility criteria in (a) and (b), above, tribes applying for a grant under this component must provide a copy of their current organization-wide Single Audit Report prepared in accordance with the Single Audit Act of 1984 (P.L. 98-502), as implemented through OMB Circular A-128. Such audit report must be free of any significant or material weaknesses.

(57 FR at 54480-81).

Section D of the Federal Register notice, titled "Application Review and Rating," provides:

(2) Area Office Responsibility

* * * * *

(b) Upon completion of the application review process, the Area Director shall rate each application based on the criteria set forth in Sections A, B and C of this announcement in accord with following guidelines:

* * * * *

(iii) Expansion/Enhancement Component

* * * * *

(B) Rationale or Justification Statement--the applicant can document or demonstrate it satisfies all of the criteria contained, in section B(3).

Points:----- (0-25).

(57 FR at 54482).

Section B(3) states unequivocally that a tribe must meet all three of the criteria listed there. The clear implication is that the criteria are intended to be true eligibility requirements.

However, section D(2)(b)(iii)(B) indicates that the criteria listed in section B(3) are only three of several factors to be considered in the evaluation of a grant application. The implication of section D(2)(b)(iii)(B) is that a tribe which fails to meet one or more of the criteria in Section B(3) would lose no more than 25 points for that reason. 2/

[1] There is a conflict between section B(3) and section D(2)(b)(iii)(B), resulting from the confusion of eligibility criteria with evaluation factors. The Area Director's decision reflects the normal understanding of an eligibility criterion--i.e., that it is a threshold requirement which an applicant must meet before it is entitled to compete with other qualified applicants. His conclusion is a reasonable interpretation of section B(3), which appears to be based upon this normal understanding. However, the conflict between that section and section D(2)(b)(iii)(B) creates an ambiguity in the guidelines as a whole. Under the rules governing interpretation of regulations concerning Indian programs, ambiguities must be resolved in favor of the Indians. See Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 239-40, 94 I.D. 353, 363 (1987), aff'd 737 F. Supp. 103 (D.D.C. 1990), aff'd 925 F.2d 490 (D.C. Cir. 1991). The Board sees no reason why the Federal Register notice at issue here should not be subject to the same rule of construction.

Even BIA officials disagree as to the proper interpretation of the conflicting provisions. At least one other Area Director has interpreted them to allow an applicant to compete for a grant despite its failure to submit an audit report. In that case, the application was simply downgraded under section D(2)(b)(iii)(B). 3/ The Board has stated that,

2/ A literal interpretation of section D(2)(b)(iii)(B) leads to the absurd conclusion that a tribe totally unqualified under section B(3) could receive a grant.

3/ This is evident from the file in another appeal before the Board, Chenega Bay I.R.A. Council v. Juneau Area Director, 24 IBIA 196 (1993).

where BIA regulations or guidelines are unclear, especially where they are unclear enough to induce conflicting interpretations from BIA officials, BIA must bear the consequences of its own lack of clarity. Carter v. Billings Area Director, 20 IBIA 195, 203-04 (1991).

[2] It might be expected that differences of interpretation would arise in a program such as this one. Given the discretionary nature of the program, some differences are acceptable. However, in a matter as basic as eligibility for the program, nation-wide consistency of interpretation is important. Such consistency is an aspect of BIA's duty to give fair and equitable treatment to all grant applicants. An equally important aspect of that duty, of course, is to give grant applicants clear notice of the eligibility criteria for the program, as well as notice of the consequences of failure to meet those criteria.

In this case, the Board finds that appellant should have been given the benefit of the ambiguity in the Federal Register notice for the Small Tribes Grant Program. Accordingly, the Board finds that appellant should have been given an opportunity to compete with other tribes, despite its failure to submit an audit report, subject to BIA's authority to take that failure into consideration under section D(2)(b)(iii)(B).

Unlike the notice for the Small Tribes Grant Program, the notice for the Planning Grant Program does not explicitly require that an applicant submit a copy of its audit report. However, in section C(2)(a)(ii), concerning "Eligibility Criteria," the notice provides: "To receive a planning grant a tribe must: * * * [h]ave no significant or material audit exceptions noted in any and all current cost audits and/or the current OMB Circular A-128 organization-wide single audit report." (Emphasis in original.) 4/ 57 FR at 54411.

Under section C(6)(b) of the Planning Grant Program notice, concerning the application rating process, the eligibility criteria are listed as one of five factors to be rated. A total of 30 points may be awarded for this

fn. 3 (continued)

See also, e.g., Chippewa Cree Tribe, supra, for an example of a case where an Area Director allowed a tribe to compete with other applicants for a Planning grant, although the tribe evidently did not meet all the eligibility criteria for the program. The Board noted in that case that "eligibility" did not appear to be a threshold requirement for the program.

4/ The Acting Area Director erred in stating that submission of the organization-wide audit report was mandatory under this section. For purposes of this decision, the Board assumes that the Acting Area Director intended to reject the application on the grounds that, by failing to submit an audit report, appellant failed to show that it had no significant or material audit exceptions.

factor. Thus, an ambiguity similar to that in the Small Tribes Grant Program is present here. For the same reasons discussed above, therefore, the Board concludes that appellant must be given the benefit of the ambiguity in the notice.

The Board therefore vacates both decisions. Normally, when it vacates a decision, the Board remands the matter to the appropriate Area Director for further consideration. In this case, however, the Board finds that the problem lies more with the notices issued by the Assistant Secretary - Indian Affairs than with the Area Director's decisions. Only the Assistant Secretary can take action to clarify the notices for future years and ensure consistency of interpretation among the various Area Offices. Therefore, the Board concludes that these cases should be referred to the Assistant Secretary for consideration of an appropriate remedy for this appellant, as well as for consideration of the underlying problems in the notices for these grant programs

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, these appeals are referred to the Assistant Secretary - Indian Affairs.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge